

# **Minutes: Minority Justice Implementation Committee**

(Unofficial Until Approved)

**13 August, 2015**

**North Dakota Department of  
Corrections  
3100 Railroad Avenue  
Bismarck, North Dakota**

**University of North Dakota (ITV  
Location), Abbott Hall Room 119  
151 Cornell Street Stop 9024  
Grand Forks, North Dakota**

## **Members Present**

Hon. Donovan Foughty  
Amy Vorachek for Leann Bertsch  
Birch Burdick  
Scott Davis  
Professor James Grijalva  
Sally Holewa  
Ulysses Jones  
Tony Weiler

## **Members Absent**

Robin Huseby  
Hon. Steven McCullough  
Dr. Leander McDonald  
Corey Pedersen  
Bruce Quick  
Dean Kathryn Rand

## **Guests**

Carol Archibold  
Molly Brooks  
Catherine Palsgraaf  
Erin Shanley  
Heidi Smith

## **Staff**

Andrew Frank

Call to Order: 10:06 a.m.

Committee members and guests introduced themselves. Guests included Erin Shanley from the Indian Affairs Commission, Catherine Palsgraaf, the Citizen Access Coordinator, Molly Brooks and Heidi Smith, from CJIS, and Professor Carol Archibold from NDSU.

Sally Holewa moved to approve the minutes from the 21 May Committee meeting. Tony Weiler seconded and the motion unanimously carried.

Chair Foughty explained the status of the amended AO21 draft submitted to the Supreme Court. The Court did not approve the name change or expansion into an access to justice commission. The Committee will continue with current projects and future

implementation of recommendations. Sally Holewa said the Court recognized the Committee's current access to justice work, but wanted make sure to keep the focus on race and bias. The decision also leaves the door open in case there is a need to implement a specific civil access to justice committee in the future.

### **Items:**

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#### **State-Tribal Forum on Cooperative Agreements**

Chair Foughty, Scott Davis, and Erin Shanley provided information on the Tribal-State Forum on Cooperative Law Enforcement Agreements. Chair Foughty explained that this subject ties into Commission recommendations calling for greater tribal and state cooperation in the areas of criminal justice and law enforcement. The forum was held in Bismarck in late July. The Bureau of Indian Affairs and the Tribal-State Committee organized the forum to discuss cooperative agreements between tribes, counties, and states. Information from this forum is available on the Indian Affairs website.

Chair Foughty said the forum was attended by the full council from Spirit Lake, the chair and members of the Turtle Mountain council, the chairman designate from Standing Rock, and good representation from Three Affiliated Tribes. Several officers from Montana shared their perspectives and experiences working with cooperative agreements for the past 15 years. The Montana agreements are between the tribe on the Fort Peck Reservation, two counties, two cities, and the state highway patrol.

Scott Davis said there is traction in some of the areas discussed, but particular concerns surrounding the banishment of drug dealers from tribes. He said it would be better to extradite offenders. In response to several questions, Scott Davis said that banishment appears to be more form over substance, because in many cases it does not change anything. Often, the banished individual may remain in the area. In addition, no one knows exactly what would result if it is challenged in court. Chair Foughty said absconding was another issue discussed. He said new agreements and closer cooperation with tribes could help address this issue and ultimately reduce disproportion in the prison system. Scott Davis added that the state can provide more options for treatment and assistance for addicts, which potentially saves lives. He noted that several recent murders in Standing Rock have been drug related. He said one of the first questions that came to mind was whether there were warrants out on the perpetrators that would have allowed them to be picked up and extradited.

Chair Foughty said when 911 calls come in, the first question asked is whether the caller is Indian or non-Indian, and this determines what emergency services will be provided. He said this situation cannot be properly characterized as emergency services, and is an example of the kinds of situations that need to be overcome. Scott Davis agreed, saying that location should not matter; the closest officers should respond. He said cooperative agreements to allow this kind of response are actually exercises of tribal sovereignty because they essentially tell the state what it is allowed to do. However, this is a mindset that many people refuse to understand. The current situation on reservations would benefit from these cooperative solutions, which would help to close loopholes and gray areas that offenders are using to their advantage.

Sally Holewa asked about interest in cross-deputization from the counties. Scott Davis said that interest depends on the county; there are long histories of difficulties between some tribes and counties. For instance, at Forth Berthold, there is one county firmly in favor of cross-deputization, while others do not appear interested. Chair Foughty described similar problems areas such as dispatch. Each county sheriff has a dispatch; there is no consolidated center. From a logistical standpoint, it would make the most sense to base dispatch out of the largest government in the area: Three Affiliated Tribes. A cooperative agreement could be formed to run a consolidated emergency dispatch system and share expenses, but this would be a big leap because there is a lot of bad history. However, Chair Foughty noted that Turtle Mountain and Spirit Lake are essentially in single counties, and if agreements develop there, they might open opportunities in other areas of the state.

Scott Davis described one of the police pursuit videos shown at the forum. He said there is a need to have an operations plan in order to know exactly who has jurisdiction in a given situation. Sometimes officers from different jurisdictions want to take the same offender into custody, while at other times, all present officers try to avoid having to do so. Chair Foughty said these situations only add stress to already stressful circumstances.

Scott Davis said that crime has risen, and these agreements have become even more necessary if the situation is going to improve.

## **Criminal Recommendation 2: Retrieval Mechanism for County/Regional Jail Data**

Staff summarized efforts to collect county-level data on pretrial detention in North Dakota. He said the Southwest Correctional Center was able to return the most thorough information of all the counties contacted. This facility uses the LERMS system. Staff met with CJIS experts to discuss the feasibility of collecting county pretrial data through LERMS. He noted that many of the smaller counties are in fact using LERMS and could provide relevant data. He invited Molly Brooks and Heidi Smith to answer questions from members.

Molly Brooks provided a general explanation of the jail management system. She said one of the services that CJIS provides is the Law Enforcement Records Management System (LERMS), which provides tracking and documentation capabilities to law enforcement. The new, upgraded program also provides jail tracking, which books inmates in and out, and tracks information such as mail logs, food requests, and many other aspects of the jail system. The new jail program can pull data in many different ways, run queries, and build complex custom reports. There is much more capability than the old system, including statistics on billing agency and race, the ability to sort presentenced populations from those sentenced, and race breakdowns for certain status codes.

This program is now available for free to correctional facilities throughout the state. Most of the smaller and medium-sized jails have this program, including: Adams, McKenzie, McLean, Mercer, Heart of America, and Southwest Multi-County. By the

end of the year, Traill, Cavalier, Pembina, Rolette, Bottineau, and Morton County will be using the system. Ramsey (Lake Region) and Stutsman Counties have also expressed interest in implementing the system. Heidi Smith said the larger counties, Grand Forks, Cass, Burleigh, and Ward, use a variety of systems, and indicated that Grand Forks has a different jail system from law enforcement. Molly Brooks said that half of correctional facilities will be on the jail management portion of the system by the end of the year.

Molly Brooks indicated that CJIS could set up a system for the state to request data directly from the county agencies or agreements could be formed in which the agencies are aware that the state is using this data. The preference is for requests to go to the agencies themselves. In the case of open records requests, CJIS will try to complete requests through agencies first, but if they refuse, CJIS may pull information directly. Brokers, which are a means of electronically exchanging data between different computer programs, might be able to help with the agencies that are not connected to LERMS through CJIS. Most products can generate custom reports. CJIS can do this at very low costs because there are state resources involved, while there may be greater costs from other vendors. CJIS could potentially help develop these conversations and share their own approach to certain problems.

Chair Foughty said some jurisdictions have done a good job getting people bonded out before they have ever been convicted of a crime, while others have not. North Dakota has not seriously looked at this issue. There could be a race or ethnicity component in who sits in jail for long periods before trial. Such findings are not uncommon for other minority groups throughout the country. Molly Brooks said a report along these lines would give a sense of trends, but this kind of general information could be provided.

Birch Burdick said that analysis must go deeper. Absence of factors such as criminal history, failure to appear, prior escapes or instances of fleeing law enforcement will skew the picture, because a judge will have this information while making decisions. Molly Brooks said CJIS could pull charges to find out bail eligibility, but, at this point, could not pull all of the information mentioned. Ulysses Jones said that from a defense standpoint, we would be arguing that a person be let out on a PR bond, especially on a first offense. Defense attorneys would be looking at factors such as job, family, history in the community, to argue that this person should not receive a bond they would not be able to post. He said that presumably someone could make a race or bias argument with regard to work release. Molly Brooks said all of the jails currently track work release differently. However, there is an upgraded version of the system that has a better work release tracking point, and there may be a way of tracking this information in some of the larger counties.

Molly Brooks said that a user group is being organized to examine this data. The primary purpose for collection is not statistical reporting, but the operational requirements of the agencies, federal reporting, and to provide information to agency commissions or councils. Most recent work has been on the upgrade, so conversations about statistical reporting have not been fully developed. The Department of Transportation indicated

they may want certain information, and participating agencies agreed to provide this up front in their user agreements.

Heidi Smith said that if a particular report has been created in the system, agencies can run it. CJIS would only need to inform agencies that a report is available and they should be able to run it to provide requested data.

### **Examining Race/Bias in the Oil Patch**

Staff said one of the issues discussed in prior meetings was race and bias issues in the oil patch. He found very little information directly addressing this topic. Most discussion related to the oil patch focused on difficulties caused by the rapid population increase. Staff attempted to contact groups that might be likely points of contact for people with complaints of bias in the system. One of these groups was the ACLU of North Dakota. The ACLU representative said the group had not received complaints on bias in law enforcement or courts, but that Texas had completed studies on this subject, and might have useful resources. The representative said that she would provide staff with an update with some information on this work.

One of the reports that staff researched examined policing in the North Dakota oil patch. This report did not address issues of race and bias, but staff contacted its author, Professor Archibold, to ask whether she had encountered any mention of race and bias while working on the study. Staff invited Professor Archibold to speak about approaches to studying this topic.

Professor Archibold said the structure of any study in the oil patch would depend on which point of contact in the process (police, courts, etc.) is being examined. The main problem would likely be data availability, because many of the agencies have elementary records systems. When asked about increased calls for service for the policing study, some officers indicated they used a notepad and pen to record calls, and they only recorded the important ones. Professor Archibold said that one of the distinctions that officers mentioned was differences between ‘new and old’ residents. The theme of race only came up when officers were asked how their communities had changed, and many mentioned the increase in ‘diversity.’

Ulysses Jones asked for clarification as to whether there was perceived bias between new and old residents. Professor Archibold said that some expressed an ‘us against them’ mentality between these groups. Chair Foughty said, although he is outside of oil country, he sometimes hears similar language used in his local area with reference to minority groups. Professor Archibold said that the language did not seem to be a similar reference to minorities.

Professor Archibold suggested doing a longitudinal study to examine the proportion of arrests prior to the oil boom compared to the second half of 2013 and 2014. She said the best data source would be existing records. However, records alone would probably not provide a good picture. Other studies have used focus groups with diverse groups of citizens to provide additional insight. Participants are invited to the group and then asked

a series of questions about law enforcement, courts, and other study topics. She said that most of the counties in the west are very cooperative - during the policing study, only two out of ten contacted agencies refused to participate, and both of these were from the same county. She suggested cooperating with churches or community groups to develop the focus groups. Chair Foughty said that the National Center for State Courts (NCSC) is working toward a study along similar lines, and North Dakota courts have notified them of their interest in participating. The emphasis in the NCSC project is also on cooperation with churches.

Staff asked whether Professor Archibold had any examples that could be good points of reference. Professor Archibold said a study in Omaha, Nebraska followed the suggested format and was very effective. She said focus groups may draw people who just want to complain, but they can also draw those who represent the communities. Ulysses Jones suggested that the 'man camps' may be good resources. Professor Archibold agreed, and said that companies often work with groups such as the Chamber of Commerce or Knights of Columbus to integrate new workers into communities. These groups would also be good points of contact. Professor Archibold said she would be happy to partner with the Committee to continue to study this subject.

### **Pretrial Assessment Information**

Staff explained examples of pretrial assessment tools included in the meeting materials and his process of examining tools to determine common predictive variables. There appears to have been at least two stages for most tools: an initial stage using a tool with many different variables, followed by a re-validation study and the adoption of a shorter, more predictive tool. Re-validation studies tended to find many of the original variables to have limited predictive value; those that did have predictive value tended to be similar.

One question from an earlier meeting was whether there could be correlations between race and certain variables used on pretrial tools. The concern was that correlations could lead to a situation where instruments preserve or exacerbate racial disparities. Staff explained a study which indicated that properly validated assessment tools do not generate disparate outcomes based on race. However, the study included only African American and Hispanic populations; no Native American populations were examined.

Staff explained examples of tools and scoring guides from several states. He said that there is an ongoing effort, current as of May, 2015, to create a national model for a pretrial risk assessment. The Laura and John Arnold Foundation has been cooperating with several other groups to develop the Public Safety Assessment – Court (PSA-Court), designed to reliably predict the likelihood of re-offending. This effort has examined about 750,000 cases from 300 jurisdictions in an attempt to develop a set of universally predictive variables. The tool consists of nine items, and was developed with the goal of allowing an assessment without an interview. This tool has been in a pilot stage since 2013, and has been found to be predictive within participating jurisdictions. Piloting will expand in the next several months, and the tool will become widely available soon after. Staff said, given the trend toward shorter, more predictive instruments, the size of the samples being tested for the PSA-Court tool, and the weeding-out of non-predictive

variables over time; it might be worth waiting for this project to develop and then investigating whether to adopt PSA-Court.

Birch Burdick asked for examples of common considerations or practices that could be implemented in the courtroom while waiting for a tool. Staff said that, generally, prior failures to appear within a given period of time tend to be predictive of failure to appear, and prior violent offenses tend to predict risk to the public. However, there is some variation in how jurisdictions consider these factors. Birch Burdick said that if someone tends to commit crimes while on probation, this would be the kind of factor considered. Priors are another factor to consider. Chair Foughty said that public safety is a higher priority for release determinations than likelihood of appearance. He said judges look at criminal records and past warrants, but this is a subjective analysis. Staff noted that some common items found in the tools include: age at first arrest, number of FTAs within a period of time, and three or more prior jail incarcerations. Many instruments include number of charges, seriousness of current charges, criminal history, certain stability factors, such as number of addresses over time, current state address, length in last job, and similar factors, but many of these have been found to be non-predictive.

Staff said there will probably be overlap between factors that judges already consider and assessment tools. Assessment tools are designed to be a supplement to judicial decision-making by ensuring that important, predictive variables are considered. He said that the surprising part of researching these tools was the number and types of variables that have been found to be non-predictive. For instance, some eliminated factors like employment at time of arrest and residential stability. Ulysses Jones asked if education level was one of these factors. Staff confirmed that some of the older assessments included education level, but re-validations tended to eliminate it.

Amy Vorachek suggested that it would probably be best to wait for the Arnold Foundation project to complete the national model tool, the PSA-Court. Members agreed to this course of action.

## **PASSPORT**

Staff shared information from the court IT department on options for sending protection orders from tribal courts into the Odyssey system. The plan described during the last meeting to allow Odyssey access for tribal courts will not work as proposed. Two or three systems come into play when orders are entered into the system: the Advocate system, the COPS system, and Odyssey. At a minimum, entry into COPS and Odyssey is required. Because the current proposal suggests entry into Odyssey and the File and Serve systems, but not the COPS system, the orders will not go to CJIS, BCI or the FBI. IT indicated that this kind of process will not work without major changes in the system.

There are also issues with simply granting tribes access to the Advocate system to enter orders. Though this might work with the current systems and could allow sufficient access for tribes, the relevant state statute indicates that tribes cannot enter orders on behalf of individuals. Changes to allow tribal access would have to go through the Supreme Court for approval, and may require amendment or clarification on the statute.

The system currently has the capability to handle their foreign order if an individual enters it on their own behalf.

Chair Foughty said that the statute should be amended so that tribes can enter orders. He said this route seems like it would be more in compliance with federal law than the current state statute.

Erin Shanley said that she spoke to the chief of police at Standing Rock, and they have started entering their orders into NiCS, which is a small step forward. She said it should be possible for tribal judges issuing orders to include a consent form for the petitioner to sign. Such a form, if received by the court, would allow them to send the order to the state in the manner described. Chair Foughty thought that this kind of request on the part of the petitioner would be sufficient. Staff suggested that if all of these options end up being unworkable, the courts could still publicize the fact that holders of domestic violence protection orders can register those orders with the state. The best available option might be to create some mechanism, a form or flyer distributed with the order, to ensure awareness of the need to register the order if the holder leaves the issuing jurisdiction.

### **Education Committee**

Professor Grijalva said that he and Scott Davis were able to speak about education outreach, but the subcommittee Chair Foughty identified during the prior meeting was not able to meet. The focus of prior discussions was to develop education outreach to diverse community members to increase understanding of the legal system. NALSA was mentioned as one group that could help target Native American high school and college students, and the general public on reservations, to provide this kind of legal education. Professor Grijalva said that he would be happy to work to develop a program about these subjects to take to the tribal colleges. He recalled that Sally Holewa suggested that the courts could provide a stipend to support these efforts, but cannot pay students directly. He suggested that the subcommittee should consider the possibility of providing extern credit for participating students. Students interested in Indian Law could receive credit for creating a basic program. If the court can pay a per diem and travel costs, Professor Grijalva and the students could take the program on the road to tribal colleges. Because much of the public input to the Commission dealt with police stops rather than unfairness in the courts, the Committee could also consider partnering with criminal justice students at NDSU to share some of the workload and create more appeal in this regard.

Members mentioned the student summer program run by Scott Davis as a possible venue. Erin Shanley indicated that Professor Grijalva and President of Law Student's Association actually made a presentation during the latest summer program. Professor Grijalva said there were good discussions with students about the experience of law school and opportunities available with a law degree. Chair Foughty said that part of the Committee's purpose is to document relevant projects that occur in the state, create a record of these efforts, and to report to the Supreme Court. He said that any knowledge that members have in this regard would be interesting to the Committee.



Professor Grijalva said the UND Law School has an Indian Law certificate program that requires students to complete in-depth analysis on a legal issue affecting Indian Country or Indian peoples as a final project. He is in the process of posting the completed projects on the Indian Law Certificate web page. The goal is to generate interest by allowing the public and potential students access to these documents. He also wants to create a small podcast in which law school professors would record talks on subjects such as basic criminal law and how the court process works. Tribal college professors could then direct students to the web page, or even provide extra credit for listening to particular podcasts. This would allow greater interaction between tribal colleges and the law school.

Professor Grijalva said Dr. McDonald spoke in prior meetings about trying to encourage interest in prelaw and legal education and develop a capacity for United Tribes College to provide education for justice system careers. Erin Shanley said there is a meeting scheduled with Dr. McDonald and the criminal justice chair to discuss the criminal justice curriculum at UTTC. This meeting is scheduled for August 17. She said that the UND curriculum will be a very important factor in how UTTC develops its own program.

### **Demographics of Bar and Legal Profession**

Staff summarized documents from Minnesota that argued for collecting demographic data from the state bar. Documents supported a mandatory requirement for attorneys to disclose information at licensure or renewal. Demographics questions were developed in cooperation with the University of Minnesota. He described the prior Commission surveys of SBAND, which had response rates around ten percent, and asked whether an effort similar to Minnesota might be required in order to allow the Committee to fulfill the related Commission recommendation.

Tony Weiler said that the number of attorneys licensed in North Dakota is around 3000, with about half practicing in-state. The out-of-state attorneys tend not to be very interested in answering surveys. He said he would look at the Minnesota information, but said that adding questions to the licensure or renewal might not work. Surveys could be created that would only include in-state lawyers, but there is a question as to whether that would provide the information the Committee needs. Surveys are generally not much of a problem to undertake because they can be developed using internet survey programs and linked to the SBAND website. The problem tends to be response rates.

Having no further business, the meeting adjourned at 12:15 p.m.